Kim J Dockstader, ISB# 4207
Gregory C. Tollefson, ISB# 5643
Teresa A. Hill, ISB# 6175
STOEL RIVES LLP
101 South Capitol Blvd., Suite 1900
Boise, Idaho 83702-5958
Telephone: (208) 389-9000
Facsimile: (208) 389-9040
kjdockstader@stoel.com
gctollefson@stoel.com
tahill@stoel.com

Attorneys for Defendant Micron Electronics, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

KIMBERLEY SMITH, MICHAEL B. HINCKLEY, JACQUELINE T. HLADUN, MARILYN J. CRAIG, JEFFREY P. CLEVENGER, and TIMOTHY C. KAUFMANN, individually and on behalf of those similarly situated, Plaintiffs, vs. MICRON ELECTRONICS, INC., a Minnesota corporation, Defendant.	Case No. CIV 01-0244-S-BLW **DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL BACKGROUND	4
A. Nature and Structure of Micron Electronics' Former Business.	4
B. Micron Electronics' Policies Required Compliance with the FLSA.	6
III. ARGUMENT	8
A. Plaintiffs Have Not Met Their Burden For Conditional Certification.	8
1. The similarly situated standard has not been met.	9
a. Plaintiffs' bald allegations are insufficient for conditional certification.	11
b. The extensive discovery conducted requires application of a heightened standard.	13
c. Plaintiffs' authorities are readily distinguishable and do not support granting notice in this case.	14
2. There is no factual nexus that binds putative class together.	16
a. The only policies common to all putative plaintiffs are in compliance with the FLSA.	16
b. There is no "de facto" policy that binds the putative class together.	17
(1) There is no evidence of any *de facto* policy of permitting off-the-clock work.	19
i. Timothy Kaufmann	20
ii. Marilyn Craig	21
iii. Michael B. Hinckley	21
iv. Jeffrey Parrish	23

v. Jacqueline Hladun 24

vi. Jeffrey Clevenger 24

vii. Tracy Scott Wells 25

viii. Tawni Weaver 25

(2) The numerous reasons stated for off-the-clock work demonstrate that there was no *de facto* policy. 26

c. The potential class is fraught with individualized determinations that dominate each claim. 29

d. No manageable class exists because of the lack of commonality of damages and variation in defenses applicable to putative plaintiffs. 32

(1) Micron Electronics' can raise a defense that sales representatives deceived them as to time worked. 33

(2) Broad variations in amount of overtime claimed by individuals and reasons for not accurately recording all time worked are individualized defenses Micron Electronics must litigate with respect to each Plaintiff and Claimant. 34

e. Other Inside Sales Representatives Specifically Contradict the Alleged Experiences of Plaintiffs and Claimants. 35

3. The court should disregard largely unsupported allegations regarding alteration of time cards. 36

a. Plaintiffs cannot find adequate support for their contention of tolerat[ing] the alteration of employee time. 36

4. Plaintiffs have failed to establish a class of similarly situated plaintiffs regarding their claim for failure to pay overtime commissions. 37

IV. CONCLUSION 39

TABLE OF AUTHORITIES

Federal Cases

	Page(s)
Adams v. United States, 21 Ct. Cl. 795 (Ct. Cl. 1990).....	35
Bayles v. Amer. Med. Response of Colo., Inc., 950 F.Supp. 1053 (D.Colo. 1996).....	10,35
Bonilla v. Las Vegas Cigar Co., 61 F.Supp.2d 1129.....	10
Brooks v. Bellsouth Telecomm., Inc., 164 F.R.D. 561 (N.D. Ala. 1995).....	10,13,14,32
Crain v. Helmerich and Payne Int'l Drilling Co., 30 Wage & Hour Cas. (BNA) 1452 (E.D.La.1992).....	10
D'Anna v. M/A-COM, Inc., 903 F.Supp. 889 (D.Md. 1995).....	9
Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413 (9th Cir. 1981).....	34
Harper v. Lovett's Buffet, Inc., 185 F.R.D. 358 (M.D. Ala. 1999).....	9,37
Harrison v. Enterprise Rent-A-Car Co., 98-233-CIV-T-24(A), 1998 U.S. Dist. LEXIS 13131 (M.D.Fla. 1998).....	14,15
Haynes v. Singer Co., 696 F.2d 884 (11th Cir. 1983).....	9
Heagney v. European Amer. Bank, 122 F.R.D. 125 (E.D.N.Y. 1988).....	12
Hoffman-Laroche, Inc. v. Sperling et al., 493 U.S. 165 (1989).....	9,10
Hoffmann v. Sbarro, Inc., 982 F.Supp. 249 (S.D.N.Y 1997).....	10
Jackson v. New York Tel Co., 163 F.R.D. 429 (S.D.N.Y. 1995).....	10
Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).....	3,33,35
Lyle v. Food Lion, Inc., 954 F.2d 984 (4th Cir. 1992).....	32
McLaughlin v. Ho Fat Seto, 850 F.2d 586 (9th Cir. 1988).....	32
Mooney v. Aramco Services Co., No. H-87-498, 1993 WL 739661 (S.D.Tex. Aug., 25 1993).....	31
Morisky v. Public Service Elec. And Gas Co., 111 F.Supp.2d 493 (D.N.J. 2000).....	13

Ray v. Motel 6 Operating, Ltd., No. 3-95-828, 1996 WL 938231 (D.Minn. March 18, 1996)..... 10,14,17,30,34

Realite v. Ark Restaurants Corp., 7 F.Supp.2d 303 (S.D.N.Y. 1998)..... 14,15

Schwed v. General Elec. Co., 159 F.R.D. 373 (N.D.N.Y. 1995)..... 11,12

Severtson v. Phillips Beverage Co., 137 F.R.D. 264 (D.Minn. 1991)..... 9,12

Theissen v. General Elec. Capital Corp., 996 F.Supp. 1071 (D.Kan. 1998)..... 10, 14

Thiebes v. Wal-Mart Stores, Inc., No. 98-802-KI, 1999 WL 1081357 (D.Or. Dec. 1, 1999) (citations omitted)..... 10

Tracy v. Dean Witter Reynolds, Inc.,185 F.R.D. 303 (D.Colo, 1998)..... 18,19

Ulvin v. Northwestern Nat'l Life Ins. Co., 141 F.R.D. 130 (D. Minn. 1991)..... 17,34

Walker v. Mountain States Tel. & Tel. Co., No. 87-M-790, 1988 WL 1000060 (D.Colo. Sept. 26, 1988)..... 34

Federal Statutes and Regulations

Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b)..... 1,9

29 U.S.C. § 255(a)..... 2

29 U.S.C. § 621 et seq..... 11

29 C.F.R. § 778.117..... 38

29 C.F.R. § 778.119..... 38

29 C.F.R. § 778.120..... 38

I. INTRODUCTION

Plaintiffs' claims in this action are not suitable for collective treatment under Section 216(b) of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 216(b). Extensive discovery in this action has plainly revealed the individualized nature of the claims. It has shown the dissimilar status of the plaintiffs with respect to each other, as well as among the claimants. Moreover, plaintiffs have failed in their burden of showing a factual nexus that binds plaintiffs, claimants and the putative class members together as alleged victims of any single decision, policy or plan by Micron Electronics which violated the FLSA. These problems are further amplified by a lack of commonality among the claims, the necessity of individualized defenses, and the specific and contradictory statements and experiences of numerous other individuals.

Notwithstanding these blatant deficiencies for collective treatment under the FLSA, plaintiffs would have this Court aid them in continuing their litigation efforts by conditionally certifying a class and potentially authorizing notice to issue to more than 500 former employees, identified only generally as "inside computer sales representatives."[1] This putative class would

---

[1]Plaintiffs state they are moving to conditionally certify "a class consisting of Micron Electronics' inside computer sales representatives from June 1, 1998." Plaintiffs' Brief in Support of Motion for Conditional Certification ("Plaintiffs' Brief") (Docket No. 76) at p. 3. However, plaintiffs create the generalized term "inside computer sales representative" apparently as a self-interested or generous reference to a diverse and broad group of individuals. There are several inherent problems with this characterization. First, Micron Electronics did not employ any such persons during the referenced time. Nevertheless, solely for purposes of responding to plaintiffs' motion, Micron Electronics will assume that plaintiffs refer to various job categories of inside sales representatives who were employed by three subsidiary companies (MicronPC, Inc., Micron Commercial Computer Systems, Inc., and Micron Government Computer Systems, Inc.), although none of these subsidiary companies are parties to this action. Second, plaintiff's characterization is unworkable and intentionally ignores obvious differences among individuals situated within this purported "class." Among other things, the subject individuals held different job titles, performed varying functions and responsibilities, worked for different sales teams at multiple locations, reported to separate supervisors and sales management within these distinct subsidiary companies, and were paid in accordance with separate and different compensation

consist of individuals who were employed by companies other than Micron Electronics at varying times over a 2 or 3 year period[2] between June 1, 1998 and May 31, 2001.[3] This broad and diverse putative class would present individualized claims that cannot be effectively, fairly and orderly managed as a single group in one collective action.

What it is more, at all relevant times Micron Electronics expressly required, pursuant to its centralized and express policies as applicable to it and its wholly-owned subsidiaries, the

---

plans and structures. Third, the characterization of the time period has no ending date and is inappropriate in temporal scope *See infra* note 2. Thus, in addition to the problems with the underlying legal merits of this case proceeding as a collective action under the FLSA, Micron Electronics disputes plaintiffs' characterization of the putative class, because it is not accurate, it fails to acknowledge important differences and dissimilarities among the individuals, and is misleading in its scope. For these reasons alone, the motion should be denied.

[2] Micron Electronics disputes that there is any evidence of a violation of the FLSA, let alone a willful violation, which would implicate a three-year statute of limitations (29 U.S.C. § 255(a)), but for the purpose of opposing plaintiffs' motion, Micron Electronics will address a three-year time frame running from June 1, 1998, to the sale and transfer of Micron Electronics' PC division on May 31, 2001(*see, infra,* fn.3). Micron Electronics has calculated the number of PC division inside sales representatives for this three-year time frame to be approximately 528 people.

[3] On May 31, 2001, Micron Electronics closed the sale of its PC division (personal computer manufacturing and sales business) to MicronPC, LLC, an affiliate of Gores Technology Group. MicronPC, LLC is a privately-held company, wholly owned by Gores Technology Group or its affiliates, and is not a subsidiary or affiliate of Micron Electronics. MicronPC, LLC and Gores Technology Group are not parties to this lawsuit, which was filed on June 1, 2001. In August of 2001, Micron Electronics merged with Interland, Inc., and is headquartered in Atlanta, Georgia.

payment of overtime compensation in compliance with the FLSA.[4] Notwithstanding this single decision, policy and plan by Micron Electronics to the contrary, plaintiffs now variously claim after leaving their employment that they each worked "off the clock" for widely varying amounts of overtime hours,[5] and at unspecified times, durations or workweeks during their employment with the subsidiary companies. Further, despite the express policy to the contrary, plaintiffs weakly assert that Micron Electronics somehow "tolerated the alteration of employee time." Plaintiffs' Brief at p. 16.

Plaintiffs have failed to establish that either they or the putative class they wish to conditionally certify is similarly situated. When the discovery and evidence obtained in this case is weighed and considered, it is readily apparent that individual issues would overwhelm any common issues, making a collective action unmanageable and completely unworkable. What is seen here is "a monster that no one can deal with, made with a [few] individual people with specific grievances." *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 361 (D.N.J. 1987).

---

[4] Among other things, these policies required employees, including inside sales representatives at subsidiary companies of Micron Electronics, (1) to accurately record on timesheets all of the time they work; (2) to review their timesheets to verify the accuracy of all time recorded (before submitting the timesheets for approval); (3) to promptly bring any error in amount of pay or discrepancy to the attention of their supervisor, so that any corrections could be made as quickly as possible; (4) to have the opportunity to work overtime on a voluntary or mandatory basis, depending on business needs and operating requirements; (5) to obtain prior approval for all overtime work; and (6) to receive overtime compensation in accordance with applicable federal and state law for all overtime hours worked. *See, e.g.*, Micron Electronics, Inc. Team Member Handbook, First Affidavit of Gregory C. Tollefson "First Tollefson Aff." at Ex. A (outlining overtime policy); Timekeeping – Non-Exempt Policy 3.15. Id at Exs. B and C (outlining expectation to accurately record time); Overtime Policy - Non-Exempt Policy 3.20. Id. At Ex. D (outlining overtime policy). Moreover, these policies also expressly prohibited employees from working "off the clock," and prohibited the altering, falsifying or tampering with time records. Timekeeping Policy 3.15. Id. at Exs. B, ¶ E; Ex. C, ¶¶ A and E; Overtime Policy 3.20. Ex. D, ¶ F.

[5] *See, e.g.*, Appendices A and B which detail plaintiffs and claimants alleged claims of unpaid overtime hours.

Accordingly, Micron Electronics files this Memorandum in opposition to plaintiffs' motion to conditionally certify a putative class and require notice to the class as a collective action under the FLSA.[6] Micron Electronics respectfully requests that conditional certification and the request for notices be denied, and the claims of plaintiffs as a class be dismissed.

II. FACTUAL BACKGROUND

A. Nature and Structure of Micron Electronics' Former Business.

Micron Electronics was established in April of 1995, and prior to May 31, 2001, was a direct vendor known for its high-tech products, including a wide range of desktop and notebook systems, multiprocessor network servers, hardware and related services. Micron Electronics developed, manufactured, marketed and supported electronic products for a broad range of computing and digital applications and custom built a wide variety of notebook and desktop PC systems and servers for its core customers in consumer, commercial and government sectors.

Under the Micron Electronics name were various sales and marketing subsidiaries, each functioning as a distinct entity and targeting different customer markets. The subsidiaries who employed inside sales representatives are MicronPC, Inc. ("MPC"),[7] Micron Commercial

---

[6] The opposition to plaintiffs' motion is further supported by affidavits and declarations previously filed (Docket Nos. 108-118 and 120-28), as well as a motion to strike (Docket Nos. 105-107).

[7] Consumer/Small Business inside sales representatives working for MPC marketed and sold Micron Electronics' computer products to consumers and small businesses. Affidavit of Robert Griffard ("Griffard Aff.") at ¶5. The consumer market was a transactional market, involving in-bound customer calls with requests for personal computers and dealing with each consumer's questions and issues. Affidavit of David McCauley ("McCauley Aff.") at ¶5. Small business representatives generally made outbound calls to develop new business in addition to maintaining the needs of the small business accounts. *Id.* at ¶ 6. See also, Deposition of Michael Hinckley ("Hinckley Depo.") at 132:20-133.4.

Computer Systems, Inc. ("MCCS"),[8] and Micron Government Computer Systems, Inc. ("MGCS").[9] Each subsidiary had its own sales forces and other personnel that focused on a different sector of buyers and encompassed different duties. In addition, each subsidiary had its own general manager, base salary, distinct reporting and organizational structures, employees, sales personnel, commission programs, tax identification numbers, mailing address, company specific invoices and purchase orders under separate letterhead, separate corporate books and records, and board of directors. These three subsidiaries were distinct corporate entities that conducted their operations as such.[10] None of these subsidiaries are parties to this action.

---

[8] Commercial inside sales representatives marketed and sold Micron Electronics' computer products and computing solutions to commercial businesses, specifically targeting medium and larger business sectors. Griffard Aff. at ¶ 5. Commercial inside sales representatives work with in-house representatives to maintain these large business accounts. Declaration of Jay Ellis ("Ellis Decl") at ¶ 6. These representatives focused primarily on handling telephone calls relating to direct sales of personal computers and related products to large, commercial organizations. *Id.* There also were outside sales representatives at MCCS who worked in multiple states, out in the field.

[9] Government inside sales representatives marketed and sold Micron Electronics' computer products to the federal government. Griffard Aff. at ¶5. Federal government inside sales representative are generally split into military and civilian sales. Military sales representatives generally have a military background and focus on agencies such as the Department of Defense and the United States Air Force. Declaration of Bill Brakeman ("Brakeman Dec.") at ¶ 3. The civilian government sales force deals with non-military agencies such as the Department of Justice. Affidavit of Mark Cox ("Cox Aff.") at ¶ 6. There is also a State and Local Education Group which focuses on schools, universities, and state governments. Deposition of Jarrod Morrison at 15:23–16:11. There were also outside sales representatives at MGCS who worked in multiple states, out in the field. However, these persons are not at issue in this litigation.

[10] *See, e.g.*, Auchampach Aff., ¶ 4; Boschee Aff., ¶ 3; Brakeman Decl., ¶ 3; Cascy Aff., ¶¶ 5-6; Chase Aff., ¶ 4; Church Aff., ¶¶ 6-7; Cox Aff., ¶ 6; Ellis Decl., ¶ 6; Groeger Aff., ¶ 5; Griffard Aff., ¶¶4-41, 14; McCauley Aff., ¶¶5-6; Nava Aff., ¶¶5-6; Pippenger Aff., ¶¶ 5-7; and Robinson Aff., ¶ 5.

For the time period relevant to this action, Micron Electronics was located in Nampa, Idaho. MPC, MCCS and MGCS were primarily located at a facility in Meridian, Idaho, as well as for a more limited time period, MPC and MCCS had a location in Roseville, Minnesota.[11]

B. Micron Electronics' Policies Required Compliance with the FLSA.

Micron Electronics provided general corporate and administrative support and assistance to its wholly-owned subsidiaries, including MPC, MCCS and MGCS. Among other things, this support and assistance included human resources services, training, payroll, timekeeping systems, and general employment policies and administration.

There were two employment policy sources promulgated by Micron Electronics during the relevant time. The first was the Team Member Handbook, which was superceded in January of 1999 by the Employment Policy Manual. Both of these publications were available and provided in hard copy. In 1999, the Employment Policy Manual also was published on-line (via the company intranet known as the "InfoNet") to all employees of Micron Electronics, as well as employees of its subsidiaries, including inside sales representatives of MPC, MCCS and MGCS.

---

[11] There are two named plaintiffs (Jacqueline Hladun, Marilyn Craig) and two claimants (Linda Lee, Erick Little) who worked for MCCS as inside sales representatives in Minnesota. These four representatives all had supervisors on site in Minnesota; Hladun, Craig and Lee, with the exception of a few short business trips to Idaho and elsewhere, performed the entirety of their work on site in Minnesota. (Hladun, 71:10, 77:1-21; Craig, 106:2-12, 111:19-112:7; Lee, 43:3-23, 62:16-63:3.) MPC operations in Minnesota closed in the Fall of 1999 and MCCS closed operations in September of 2000. (McCauley, 97:2-98:1, 106:23-24, 107:9-11, 115:12-116:8.) Micron Electronics also completely closed the Minnesota facility in September of 2000. No inside sales representatives have worked in Minnesota since that date, either for Micron Electronics or for any of its wholly-owned subsidiaries.

(See, e.g. Plaintiffs' Affidavit of Kurt A. Swanson, ¶4, Ex. C.)[12]

Micron Electronics' policies expressly prohibit work off-the-clock and required all employees to accurately record all time worked. For example, these policies clearly stated that their purpose was "[t]o ensure accurate recording of time worked for all non-exempt (hourly) employees" and that the policies applied to all employees at Micron Electronics' "facilities, subsidiaries and divisions." (*Id.*) The policies therefore applied to MPC, MCCS and MGCS. Some additional highlights of these policies include:

> Non-exempt employees are expected to accurately record the time they begin and end their work, as well as the beginning and ending time of each meal period. They should also record the beginning and ending of any split shift or departure from work for personal reasons.
>
> No work should be performed off the clock. All time worked must be recorded. Failure to record all time worked will subject the employee to disciplinary action up to and including termination.
>
> Prior to submissions of timesheets for supervisor approval, non-exempt employees are responsible for reviewing their timesheets to verify the accuracy of all time recorded.

First Tollefson Aff., Exs. B, C.

In addition, Micron Electronics had a specific policy for overtime pay, which applied to employees at Micron Electronics' "facilities, subsidiaries and divisions." The policy

---

[12] Employees of Micron Electronics and of its subsidiaries were required to acknowledge receipt and access to the Team Member handbook and/or the Employment Policy Manual and to familiarize themselves with it and comply with its policies. Anderson Aff., ¶ 5; Angus Aff., ¶ 7; DeRouen Aff., ¶ 12, Fillmore Aff., ¶¶ 4, 9; Garcia Aff., ¶ 7; Hopkins Aff. ¶ 3; Kaufmann Aff., ¶ 6; Larscheid Aff., ¶¶ 4, 12; Little Aff., ¶ 4; Mattson Aff., ¶ 3; Schoonveld Aff., ¶¶ 3, 7; Stumph Aff., ¶ 3; Swanson Aff., ¶ 4, 10; Wells Aff., ¶ 6, 10, 12; Wing Aff. ¶ 3. As can be seen from these selections, plaintiffs and claimants do not dispute the policies applied to them, and that they were informed of the policies.

demonstrates Micron Electronics' ongoing commitment to ensuring compliance with overtime requirements of the FLSA. For example:

> Overtime compensation is paid to all non-exempt employees in accordance with applicable federal and state wage and hour regulations.
>
> Failure to work scheduled overtime, or working overtime without prior authorization from the non-exempt employee's supervisor or manager, may result in disciplinary action, up to and including termination of employment.
>
> Non-exempt employees are not allowed to work "off the clock." All time worked by a non-exempt employee (including overtime) must be accurately recorded for the week in which the work is performed.

First Tollefson Aff., Ex. D.[13]

III. ARGUMENT

A. Plaintiffs Have Not Met Their Burden For Conditional Certification.

Plaintiffs have not met their threshold burden of showing that they and the putative class members are "similarly situated." Therefore, plaintiffs should not be granted conditional certification and the Court should not facilitate notice to any putative class.

This Court has the authority to facilitate notice to potential plaintiffs, however, this

---

[13] Plaintiffs assert that "Micron said all the right things in its written policy manual, but when it came to its actual practices, MEI did just the opposite." Plaintiffs' Brief at p. 12. However, plaintiffs provide no support for such a bold assertion, and ignore the fact that the policies were voluntarily violated by themselves and the claimants, who according to their allegations worked off-the-clock, but did not inform their supervisors or any other management personnel that such work was being performed. *See, e.g.*, deposition citations at Section 46.

authority should be "exercised with discretion and only in appropriate cases."[14] There are additional important considerations:

> As a matter of sound case management, a court should, before offering [to assist plaintiff in locating additional plaintiffs], *make a preliminary inquiry as to whether a manageable class exists*.... The courts, as well as practicing attorneys, *have a responsibility to avoid the "stirring up" of litigation* through unwarranted solicitation.

D'Anna v. M/A-COM, Inc., 903 F.Supp. 889 (D.Md. 1995) (emphasis added) (citing *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 266-67 (D.Minn. 1991)). As shown below, plaintiffs have not met the burden for conditional certification under Section 216(b) of the FLSA. This Court should not assist plaintiffs in locating additional potential parties, where the evidence already before the Court demonstrates that no manageable class exists. Therefore, the Court should deny conditional class certification and decline to authorize notice.

1. The similarly situated standard has not been met.

Plaintiffs have failed to show that they and any putative class members are similarly situated for purposes of a collective action in this case. Under Section 216(b) of the FLSA, notice is appropriate only if plaintiffs meet their burden of showing that members of the potential class are "similarly situated." 29 U.S.C. § 216(b); *Hoffmann-LaRoche, Inc.*, 493 U.S. at 169-70; *Harper*, 185 F.R.D. at 362. Although the FLSA does not define similarly situated, and the Ninth Circuit has not yet articulated a standard for similarly situated, courts considering the issue have

---

[14] *See, e.g., Harper v. Lovett's Buffet, Inc.*, 185 F.R.D. 358, 361 (M.D. Ala. 1999) (citing *Haynes v. Singer Co.*, 696 F.2d 884, 886 (11th Cir. 1983); *Hoffmann-LaRoche, Inc. v. Sperling et al.*, 493 U.S. 165, 170 (1989) (stating that courts have the "requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible and not otherwise contrary to the statutory commands or the provisions of the Federal Rules of Civil Procedure.")

concluded that to meet this burden, plaintiffs must demonstrate "similarity among the individual situations" and to provide a "factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged policy or practice."[15]

The district court of Oregon has similarly applied this standard, and requires that "[f]or prospective plaintiffs to be similarly situated, there must be a factual nexus which binds them together as victims of an alleged policy or practice." *Thiebes v. Wal-Mart Stores, Inc.*, No. 98-802-KI, 1999 WL 1081357 at * 2 (D.Or. Dec. 1, 1999) (citations omitted). Thus, all putative class members must be subject to a "single decision, policy or plan" of the employer that caused the alleged violation.[16] Then, plaintiffs must demonstrate "that there is a link between this alleged policy and the adverse job actions." *Theissen v. General Elec. Capital Corp.*, 996 F.Supp. 1071, 1083 (D.Kan. 1998) ("Even if there was a discriminatory policy, the opt-in plaintiffs are only 'similarly situated' if they can make a submissible case that they, too, were victims of it.").

Consequently, in order for plaintiffs to prevail on their motion for conditional certification and court-approved notice, they must demonstrate that there existed, throughout Micron Electronics and its three separate and distinct sales subsidiaries, in Idaho and in Minnesota, for several years, a company-wide single decision, policy or plan that caused each alleged FLSA violation. *Bayles*, 950 F.Supp. at 1066; *Brooks*, 164 F.R.D. at 568; *Ray v. Motel*

---

[15] *Bonilla v. Las Vegas Cigar Co.*, 61 F.Supp.2d 1129, 1139 n.6 (citing *Crain v. Helmerich and Payne Int'l Drilling Co.*, 30 Wage & Hour Cas. (BNA) 1452 (E.D.La.1992). *See also*, *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249 (S.D.N.Y. 1997) (defined as "potential plaintiffs who together were victims of a common policy or plan that violated the law").

[16] *Hoffmann*, 982 F.Supp. at 261; *see also, Bayles v. Amer. Med. Response of Colo., Inc.*, 950 F.Supp. 1053, 1066 (D.Colo. 1996); *Brooks v. Bellsouth Telecomm., Inc.*, 164 F.R.D. 561, 566 (N.D. Ala. 1995); *Jackson v. New York Tel Co.*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995).

6, No. 3-95-828, 1996 WL 938231, *4 (D.Minn. March 18, 1996). Plaintiffs have not met this burden, indeed, they are not even close.

a. Plaintiffs' bald allegations are insufficient for conditional certification.

Plaintiffs advocate the use of a two-tier system for certification, and argue for the application of a "lenient" factual standard, which would allow conditional certification based simply on an "allegation that a group of similarly-situated employees exist." Plaintiffs' Brief, p.7. However, the lenient standard advocated by plaintiffs is inapplicable to the case at hand because of the extensive discovery already conducted, and even if applied, does not warrant conditional certification.

Even the most lenient standard for conditional certification requires substantial allegations that the putative class members were together victims of a single decision, policy or plan, thereby leaving little doubt that a manageable case exists. For example, plaintiffs cite *Schwed v. General Elec. Co.*, 159 F.R.D. 373 (N.D.N.Y. 1995) as an example of what plaintiffs consider the minimal requirements for conditional certification. Plaintiffs' Brief at pp. 6-7, 10. However, in *Schwed*, the putative plaintiffs were a very narrowly tailored, limited group. In authorizing notice to the *Schwed* class, the court found that "the potential plaintiffs ... are limited to a single geographic area and the adverse employment action occurred at precisely the same time." 159 F.R.D. at 377. The court further noted that because of the "limited number of potential plaintiffs ... taken together with the commonalties described ... the court foresees no complication in the manageability of this case." *Id.* [17]

[17] *Schwed* is a case brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., which incorporates the enforcement provisions of the FLSA including the "opt-in" provisions of 29 U.S.C. § 216(b).

Plaintiffs also cite *Heagney v. European Amer. Bank*, 122 F.R.D. 125, 128 (E.D.N.Y. 1988) as requiring a minimal showing for conditional certification. In *Heagney*, although the class was diverse, the court allowed notice because all the putative plaintiffs were subject to an overriding and specific policy that dominated each of their claims – they all left the defendant's employ by accepting an Early Retirement Incentive Program (referred to as a "smokescreen for a deliberate campaign of discrimination").[18] The court noted that the "allegations suffice to satisfy the 'similarly situated' standard" because "the alleged unity of the discriminatory scheme they faced overwhelms [the] differences [between the workers]." *Id.*

In each of these cases, the specificity of the allegations and the narrowness of the potential class (because they were all victims of a common and single decision, policy or plan), on their face eliminate concerns over manageability of the class, and alleviate legitimate concerns about the stirring up of litigation. However, unlike *Schwed* and *Heagany,* in this case plaintiffs have failed to set forth a well-defined, narrow class of putative plaintiffs and have not alleged and shown with evidentiary support a single decision, plan or policy by Micron Electronics that dominates and unifies individualized claims. Instead, plaintiffs have simply made conclusory and vague allegations (which are unsupported by competent evidence) that Micron Electronics had a "*de facto*" policy of accepting overtime work "off-the-clock." What is more, plaintiffs do so despite admitting that Micron Electronics had express policies directly to

---

[18] Plaintiffs' brief further cites *Severtson v. Phillips Beverage Co.,* 137 F.R.D. 264 (D.Minn. 1991) in support of a "minimal evidence" standard for conditional certification. Plaintiffs' Brief at p. 8. This citation is misplaced. In *Severtson,* the district court reversed the magistrate judge's authorization of notice. 137 F.R.D. at 267. The district court noted that the conclusory allegations in the complaint were insufficient to support court authorized notice. *Id.* at 266. Specifically, the court held that to obtain court authorization to send notice "plaintiffs must submit evidence establishing at least a colorable basis for their claim that a class of 'similarly situated' plaintiffs exist." *Id.* at 267.

the contrary. These allegations, on their face, do not provide a colorable basis for plaintiffs' claim that a class of similarly situated plaintiffs exists and do not eliminate concerns over the manageability of the putative class or justify enlisting the Court's assistance in stirring up more litigation.

b. The extensive discovery conducted requires application of a heightened standard.

The "lenient" standard advocated by plaintiffs is inapplicable to the case at hand because extensive discovery already has taken place.[19] The use of an "intermediate" or heightened standard is more appropriate. Once discovery has taken place, the Court can undertake a more rigorous analysis at the conditional certification stage because evidence beyond mere allegations exists upon which to make the notice and conditional certification determination. *See, e.g.*, *Morisky v. Public Service Elec. and Gas Co.*, 111 F.Supp.2d 493 (D.N.J. 2000) (applying a "stricter standard" in FLSA overtime and classification case where discovery had taken place and over 100 persons had already opted in);[20] *Brooks*, 164 F.R.D. at 567 (distinguishing

[19] Both sides have served and responded to numerous discovery requests. In addition to interrogatory responses, the parties have produced approximately 16,300 documents. As of the date of filing this brief, plaintiffs have taken a total of 12 depositions and Micron Electronics has taken 22 depositions. Additionally, plaintiffs currently are scheduled to take a 30(b)(6) deposition of Micron Electronics on August 28, 2002 on certain limited items.

[20] In *Morisky*, the court first reviewed the typical "two-step approach" (with a "fairly lenient standard" applying at the notice stage because there is minimal evidence, but then employing a stricter standard for "similarly-situated" at the second stage). However, the court then explained that the typical framework was not appropriate: "This case is somewhat different. It is clearly beyond the first tier of the above analysis, as over 100 potential plaintiffs have already opted into this lawsuit [and discovery has been undertaken]. . . . It is appropriate, therefore, for the Court to apply a stricter standard in its analysis of the question before it, and in

from situation where "decision to conditionally certify the class apparently came before discovery on the pertinent issues" and reviewing the "extensive discovery" -- consisting of a three-month period where plaintiff deposed seven management employees, and received numerous discovery documents -- before declining to conditionally certify class); *Thiessen*, 996 F. Supp. at 1080-81 (applying an "intermediate" standard where some discovery had taken place); *Ray*, 1996 WL 938231 at *4 (rejecting the "lenient" standard as "the facts before the Court are extensive, [and] there is no need for discovery in order to reach a determination").

Because of the discovery to date, plaintiffs should be held to an intermediate heightened standard and should not be allowed to rest on mere allegations, but must make a sufficient factual showing, based on the evidence available, that the plaintiff, claimants and putative class members are similarly situated (which they cannot).[21] In this case, plaintiffs have not made any preliminary showing of the requisite factual nexus, even under the most lenient standard, that Micron Electronics implemented a single decision, policy or plan that caused the alleged violations of the FLSA. Conditional class certification and notice are therefore inappropriate.

c. Plaintiffs' authorities are readily distinguishable and do not support granting notice in this case.

Plaintiffs set forth several cases as examples of courts ordering notice or conditional certification -- presumably as examples for this Court to follow here. However, each case is distinguishable and inapplicable, primarily because in those cases no discovery had been

---

doing so, finds that plaintiffs have not met their burden." 111 F.Supp.2d at 497-98. The court then declined to grant conditional certification. *Id.*, at 500.

[21] *See, e.g., Brooks v. BellSouth Telecommunications, Inc.*, 164 F.R.D. 561, 567 (N.D.Ala.1995) (appropriate standard is whether plaintiff demonstrated "a sufficient factual basis on which a reasonable inference could be made that defendant[ ] orchestrated or implemented a single decision, policy or plan to discriminate.")

conducted or was available for the courts' consideration. Consequently, notice was allowed to go forward, pending discovery and anticipating a more rigorous factually-supported analysis at a subsequent stage. This case is already at that subsequent stage.

In *Realite v. Ark Restaurants Corp.*, 7 F.Supp.2d 303 (S.D.N.Y. 1998), the court found that, pending discovery and since it was so "early in the proceeding," FLSA class certification and notice would be appropriate. Specifically, aside from the pleadings, the only evidence the court had to consider was one affidavit filed by the employer and affidavits filed by ten named plaintiffs. No formal discovery (including written discovery and depositions), apparently had been conducted. *Id.* at 305.[22] This is in stark contrast to the situation *sub judice*, where extensive written and deposition discovery has been conducted and where a substantial record of evidence has been presented to the Court.

The court in *Harrison v. Enterprise Rent-A-Car Co.*, 98-233-CIV-T-24(A), 1998 U.S.Dist. LEXIS 13131 (M.D.Fla. 1998), in discussing its ability to facilitate notice, acknowledged that "the district court's decision . . . *is usually based only on the pleadings and any affidavits submitted.*" *Id.* at *5-6 (emphasis added). This obviously contemplates that no written discovery or depositions have been conducted, otherwise, such evidence would certainly be presented for consideration. *Id.* at *12 ("Indeed, *discovery* may prove that Plaintiffs and the potential opt-ins are not similarly situated after all.") (emphasis added).

---

[22] Certainly, the Court's decision in *Realite* was also likely influenced by the fact that the employer *had publicly admitted wrongdoing* in a 10-Q SEC filing which, in reference to the lawsuit stated: "The Company believes that there were certain violations of various labor laws." *Id.* at 308. Additionally, it also appeared that the employer "did not use time clocks or sign-in sheets or any other system to keep track of the actual number of hours [ ] worked" and also paid its hourly workers a fixed rate regardless of the hours worked. *Id.* at 307.

2. There is no factual nexus that binds putative class together.

a. The only policies common to all putative plaintiffs are in compliance with the FLSA.

Micron Electronics' time keeping and overtime policies specifically prohibit off the clock work. *See,* First Tollefson Aff. Exs. A-D. Plaintiffs do not dispute that Micron Electronics' stated policies are in compliance with the FLSA and that Micron Electronics' timekeeping policy specifically prohibits "off the clock" work.[23]

Inside sales representatives for MPC, MCCS or MGCS in the time period from November, 1998 to May 31, 2001 (from the class of persons sought to be certified) also acknowledge this. Dockstader Aff., Ex. A at ¶¶ 3-4 (affidavit setting forth requirements of policies, which also were understood.) Moreover, these former inside sales representatives' experiences were that their supervisors and managers expected them to follow the policies and that none of their supervisors or managers ever required or told them to violate any of the policies. *Id.* at ¶ 5 of each affidavit. Finally, these inside sales representatives acknowledge that none of their supervisors or anyone else in management ever instructed, permitted or encouraged them not to record all their work time or to perform work off the clock. *Id.*[24]

---

[23] Plaintiffs' Brief at p. 12; Craig, 69:22-70:16; Clevenger, 68:15-69:11; Hladun, 39:10-21, 57:16-25; Hinckley, 262:2-22; Kaufmann, 88:20-22, 89:12-90:3; Smith, 266:17-267:6.

[24] Additionally, Marcus Auchampach, Larry Chase, Jay Ellis, and Jaime Nava, each worked as inside sales representatives (i.e., as "account developers"), during the relevant time period. All four of them testify that they recorded and were paid for all of the overtime they worked. Auchampach Aff., ¶ 9; Chase Aff., ¶ 10; Ellis Decl., ¶ 15 and Nava Aff. ¶¶ 12-13. Each also adhered to company policy with regard to overtime and timekeeping practices. Auchampach Aff., ¶¶ 9-10; Chase Aff., ¶¶ 3, 9-11; Ellis Decl., ¶¶ 4-5 and Nava Aff. ¶ 4.

Moreover, Plaintiffs and Claimants, when asked, admit that they have been paid for overtime they recorded.[25] Supervisors also verify that they never told sales representatives to work off the clock.[26] Consequently, there was no common policy or plan implemented on a centralized basis that encouraged FLSA violations. Thus if there was any action contrary to company policy it was an isolated phenomenon. *Ulvin v. Northwestern Nat'l. Life Ins. Co.*, 141 F.R.D. 130, 131 (D. Minn. 1991); *Ray v. Motel 6 Operating, Ltd.*, 1996 WL 938231 (D. Minn. 1986). Accordingly, there is no factual nexus binding plaintiffs or any putative class together as victims of a single decision, policy or plan.[27]

b. There is no "de facto" policy that binds the putative class together.

The depositions and affidavits provided by both parties demonstrate that plaintiffs and claimants randomly and voluntarily chose to work and not record some overtime, for their own, individualized motivations, including personal commissions, laziness and being inefficient.

---

[25] Anderson, 32:12-16; Clevenger, 71:6-23; Ell, 40:11-13, 41:2-5, 54:11-13; Ken Ford, 66:18-67:2; Hinckley, 112:1-7, 113:12-18, 120:16-22; Kaufmann, 78:25-79:3, 86:2-5, 12-17; Ryan Keen, 109:8-13; Larscheid Aff., ¶ 14; Linda Lee, 42:18-43:2; McGeorge, 30:7-11; Mattson, 39:14-19; Moffett, 100:6-21; Parrish, 59:13-24; 68:1-4; Stumph Aff. ¶ 14; Swanson Aff. ¶ 11; Tracy Scott Wells, Aff. ¶ 13.

[26] Auchampach Aff., ¶ 7; Boschee Aff., ¶ 8; Brakeman Decl., ¶ 7; Casey Aff., ¶¶ 4, 10; Chase Aff., ¶ 5-6,8; Church Aff., ¶¶ 4, 11; Cox Aff., ¶¶ 4, 11; Ellis Decl., ¶¶ 4, 9-12; Groeger Aff., ¶ 4, 8, 9; McCauley Aff., ¶¶ 7-8; Nava Aff., ¶¶ 4, 7, 8, 10; Robinson Aff., ¶¶ 4, 7-9.

[27] In *Ulvin v. Northwestern Nat'l Life Ins. Co.*, 141 F.R.D. 130 (D.Minn. 1991), the court initially gave permission to the plaintiff to send notice to other potential plaintiffs, but did not certify the class. *Id.* at 131. The court later declined to certify the class because of the significant variations in the prospective plaintiffs' ages, year of termination, type of termination, offices where they worked, and other differences. *Id.* "Given the disparities among [plaintiff] and the thirty opt-ins, the court concludes that they are not similarly-situated, and that these case are unsuited for class action." *Id.* The court also specifically rejected the following allegation by the plaintiff: "A company-wide plan to downgrade and eliminate older workers to reduce costs and therefore plaintiff and opt-ins are similarly situated in that the entire class sustained injury from the defendant's unlawful policy or practice." *Id.*

Many readily admit that they secretly performed work without informing their supervisors, and with the knowledge that overtime was not authorized, yet they now allege there was a "*de facto* policy" which *caused* them to work off the clock. Additionally, the argument of "an unstated *de facto* policy of accepting off-the-clock work" (Plaintiffs' Brief, p.12) reflects an inherently flawed concept which is unsupported by any evidence.

In *Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303 (D.Colo. 1998), the court (in denying the plaintiffs' motion to expand discovery in aid of obtaining FLSA class certification) addressed the plaintiffs' contentions with regard to policies, practices and particularly allegations of a "*de facto* policy." First, the court noted that "the phrase '*de facto* policy' either blurs the distinction between policy and practice, or attempts to blend the two." 185 F.R.D. at 306. The court defined "policy" as "that which is directed through publication, while *de facto* refers to that which is actually done." *Id.* For example:

> If fifty people are walking in the same direction, that is the event, or *de facto*; if the fifty people have been told by a single source to walk in a particular direction, their common direction reflects that they are walking pursuant to the directive, or policy. The distinction needs to be kept in mind throughout the dispute which arises from plaintiffs' motion to extend discovery, because fifty people walking in the same direction may or may not be doing so pursuant to policy or directive, depending upon the evidence which is available.

Id.[28] The above distinction between an alleged "*de facto*" policy and an actual directive or policy is similarly important in this case.

Plaintiffs have not put forth sufficient evidence (or even sufficient allegations) to demonstrate the existence of any policy or directive by Micron Electronics that pervades across all three sales subsidiaries. This is (in part) because although inside sales representatives may claim they did not accurately record their time, there is nothing to demonstrate they were all caused to do so by the same company-wide policy or directive.[29] The only policy or directive that has been established and applied consistently throughout MPC, MCCS, and MGCS is Micron Electronics' overtime and timekeeping policies which mandate strict compliance with the requirements of the FLSA. Thus, even assuming *arguendo*, that some of the plaintiffs and claimants may be walking the same direction, they are not doing so pursuant to the same policy or directive; they cannot, *de jure*, be similarly situated.

(1) There is no evidence of any *de facto* policy of permitting off-the-clock work.

Plaintiffs provide no basis for their claim that Micron Electronics had "an unstated *de facto* policy of accepting off-the-clock work by its sales force." (Plaintiffs' Brief, p.12.) Instead of demonstrating how this alleged "*de facto*" policy encompasses the entire inside sales force,

---

[28] The court also found "[i]t is beyond dispute that the national policy of Dean Witter is to pay overtime compensation to employees who have obtained approval to work overtime, and who have actually worked beyond 40 hours per week," and that "[p]laintiffs do not deny that Dean Witter distributes this policy on a nationwide basis." *Id.*, at 306-307. Furthermore, "[p]laintiffs submitted absolutely no evidence of any Dean Witter policy on overtime which is different . . . ." *Id.*

[29] *See, e.g., Tracy*, 185 F.R.D. at 312 (finding that the depositions and affidavits contradict any claim or argument that plaintiffs' failure to obtain overtime compensation was pursuant to a national policy; instead, the evidence "*suggests that plaintiffs were deprived of overtime compensation for reasons which were specific to [one location], and were unrelated to any national policy.*" (emphasis added).)

plaintiffs simply regurgitate isolated, anecdotal evidence of individual claims for some varying amounts of off-the-clock work and ask the Court to infer every one was caused by a single, unifying policy. However, no such policy exists.

For example, plaintiffs make the bald allegation that "sales representatives regularly worked more than the allowed amount of overtime with the knowledge and acquiescence of Micron Electronics supervisory personnel." (Plaintiffs' Brief, p.12). But, there is no factual support for such a bold assertion. A review and analysis of the out-of-context and misleading citations of the deposition excerpts of nine persons confirms that plaintiffs have failed to meet their burden to demonstrate Micron Electronics orchestrated or implemented a single decision, policy or plan that caused violations of the FLSA.

i. Timothy Kaufmann

Plaintiffs reproduce a small section of a string of email correspondence between Mark Cox and Timothy Kaufmann[30] in August of 2000, and extrapolate from that small section to the unfounded assertion that the portion of the email exemplifies plaintiffs' purported "*de facto* policy." (Plaintiffs' Brief, p. 13.) Nothing could be further from the truth.

No other sales representatives or any one else was included on the emails; the entire chain of email correspondence was between only Kaufmann and Cox and was initiated by an ambiguous email from Kaufmann (mentioning that he came in an hour before his shift began and wanted to leave one half-hour early). Plaintiffs quote from one of the earlier emails in the chain, but conveniently omit the last and final email from Cox, which makes clear that any overtime worked will be paid: *"Don't get me wrong, if you need to be here then I/Micron will certainly*

---

[30] The string of email correspondence referred to can be found attached as Exhibit A to Plaintiffs' Second Amended Complaint (Docket No. 94.)

pay you for your efforts." (Docket no. 94, Ex. A (emphasis added); *see also*, Kaufmann, 140:9-141:2 (admitting that that this was the final email of the dialogue).) Cox explains that there were other problems and concerns with Kaufmann and that Cox was not requiring or inferring that Kaufmann should omit a ½ hour of overtime from his timesheet. (Cox Aff., ¶¶ 12-13.)[31]

ii. Marilyn Craig

Marilyn Craig worked from June 1, 1998, until the first week of September 2000 as a commercial inside sales representative for MCCS in Minnesota. She admitted in her deposition that she could (and did) at times ask her supervisor, Lori Chitwood, whether she could work overtime. However, Craig complained that this would entail having to justify the reasons the overtime was needed.[32]

iii. Michael B. Hinckley

Plaintiffs attribute the following statement to Michael Hinckley, and self-servingly label it a "policy," but then fail to explain the context, timing and other associated limitations: "[I]f

---

[31] At the time of this email, Mark Cox was employed by MGCS as a supervisor for a Civilian Sales team of approximately eight people. (Kaufmann 52:10-53:6.) Kaufmann only worked for Cox for a little over three months (from late June, 2000 through early October, 2000) (Kaufmann 47:18-48:6.) At his deposition, Kaufmann admitted that over his three and one-half year tenure overtime was frequently approved as long as it was "within reason." (Kaufmann, 64:2-24.) For example, for the period that Dominic Casey was Kaufmann's supervisor in commercial sales (Kaufmann, 30:13-15), Kaufmann candidly explained how he could work plenty of overtime as long there were legitimate business reasons to do so: "That occurred with Mr. Casey, and I don't recall the exact circumstance, but he -- you know, if we had an abnormal amount of hours, he would ask us, 'Why did you need to work 10 hours overtime this week?' And you'd say reasons one, two, and three. And he'd say, 'Fine, no problem.'" (Kaufmann, 145:19-146:4)

[32] "[Y]ou would have to go through the whole scenario what you're going to be doing during that time period." (Craig 68:3-9; *see also*, 78:16-79:4 "At times she would say, you know, yes, go ahead, you can work these hours, but I needed to explain what I needed it for.") Moreover, Craig also admits that "[s]ome supervisors did not care how many hours you worked overtime." (Craig 72:14-16; *see also* 73:16-18 "there were other supervisors that other people had that said work as much as you want").)

you do not have the time to get your job done during the day, that you work overtime, but you're not going to get paid for it." (Plaintiffs' Brief, pp.12-13, *quoting* Hinckley deposition, 269:14-16.) This so-called "policy" was not anything of the sort.[33]

The statement that Hinckley alleges Jaime Nava made (if it happened at all) was an isolated occurrence in February of 2001. Hinckley claims that Nava told the small business team (12-13 people) that "they weren't going to pay overtime more than about six or eight hours per pay period [every two weeks]."[34] (Hinckley, 106:12-108:8.)[35]

With regard to Micron Electronics' policy requiring all time worked, including overtime, to be accurately recorded for the week in which it was performed, Hinckley acknowledged: "Yes. I probably followed the policy until after the meeting with Jaime Nava." (Hinckley,

---

[33] First, for accurate background, Hinckley only worked from late April 2000 to the end of May 2001 (as a small business representative with MPC). (Hinckley, 70:6-17, 8:23-9:2.) Hinckley had Jaime Nava as his supervisor from April 2000 through mid-March, 2001, and then Tawni Weaver was his supervisor through May 31, 2001. (Hinckley, 202:3-9.)

[34]Plaintiff Kimberly Smith was one of the 12-13 people who was in attendance at this same meeting, but her version of what Jaime Nava said is quite different from Hinckley's -- Smith testified that Nava told the team not to record more than 47 hours each week, and further, that Nava's statement had no effect on her time-keeping practices. (Smith, 247:25-248:8, 249:21-250:10; *see also*, Smith, 399:8-19.) Jeffrey Parrish also was present at the same sales team meeting with Smith and Hinckley, but he testified that Nava said something completely different: "My recollection is that we were told as a team that [Nava's] budget had no more room for overtime" and "[t]hat there would be no more overtime." (Parrish, 82:18-85:24.)

[35] Hinckley admits that long before this meeting, he had been recording "most" of his overtime and was paid for the overtime he recorded. (Hinckley, 111:23-112:7.) Only after the meeting took place did he claim, "I started not recording all the hours I worked." However, he also admitted that after February, 2001 he continued to work some overtime and get paid for it. (Hinckley, 112:8-13, 120:19-22; *see also*, 199:18-25 "[after the meeting] I worked the overtime and sometimes didn't put it on my time sheets . . .") Hinckley further admitted that, before the February 2001 meeting, he had never been told anything like this before. (Hinckley, 116:20-22.)

262:13-263:13 -- also acknowledging that Micron Electronics and MPC followed the policy until the February, 2001 meeting; *see also*, Nava Aff., ¶ 4.)[36]

iv. Jeffrey Parrish

Plaintiffs overreach by arguing that Jeffrey Parrish[37] "was told not to record any overtime, but was not told 'don't work overtime.'" (Plaintiffs' Brief, p. 14, citing Parrish Depo., 62:3-9.) In fact, Parrish admits his supervisors never told him not to work overtime and not record it (Parrish, 58:18-20; 62:3-17), although he generally asserts his supervisor knew he was not recording his overtime. (Parrish, 56:7-20, 74:8-75:14, 76:15-19, 77:11-17.) Parrish admits he violated the timekeeping and overtime policies and that it was his own decision not to record his overtime. (Parrish, 49:3-16; 54:24-55:2; 55:11-13; 66:11-25) Prior to the alleged "no overtime" directive in February 2001,[38] Parrish recorded and was paid for all of his overtime. (Parrish, 59:13-24; 68:1-4.) Parrish admits he did not ask his supervisors to pre-approve his overtime. (Parrish, 59:5-12; 72:19-25). In short, Parrish's testimony was that in order to "build [his] business", he felt he "needed to work outside the parameters that were given to [him] in [his] eight-hour shift." (Parrish, 55:3-10.) These are uniquely individual concerns.

---

[36] Hinckley further testified that, aside from the Jaime Nava comment, he was not aware of any other instance in which people were told not to follow the company's overtime policy. (Hinckley, 263:22-264:4.) After he moved over to Tawni Weaver's team in mid-March, 2001, Hinckley continued to follow the purported overtime directions from Nava, despite the fact that his supervisor, Weaver, apparently never told him to do so. (Hinckley, 268:4-24.)

[37] Parrish worked as a small business sales representative for MPC from May 2000 to May 31, 2001. (Parrish, 14:20-15:7, 15:21-16:3.)

[38] By "directive," Parrish testified that he was referring to an instance where Jaime Nava "had told the team that we did not have any more overtime in the budget, available in the budget." (Parrish, 59:25-60:10.)

v. Jacqueline Hladun

Jacqueline Hladun was employed until August of 2000 by MCCS in Roseville, Minnesota, as a commercial inside sales representative. (Hladun, 13:21-14:3.) Hladun testified that instead of 40 hours per week, "at times they would say that you could input additional overtime. The max was usually 45 hours that they would accept on that." (Hladun, 41:14-41:17; *see also*, 40:20-22 ("The majority of the time was there's no overtime to be paid past maybe two to five hours, upon approval would they accept those.").) However, despite these allegations, when questioned at her deposition, Hladun was evasive regarding whether she was truly "required" to work overtime in Minnesota (*See*, Hladun, 102:14-103:20.)

vi. Jeffrey Clevenger

An excerpt from Plaintiff Jeffery Clevenger's deposition testimony is provided and presented for the alleged practice of inside sales representatives "performing necessary work, but not getting paid for it." Plaintiffs' Brief, p. 14. Yet, the excerpt presented does not say that representatives weren't *recording* their overtime, but simply states "everyone was *working* overtime regardless of the fact." (*Id.*, emphasis added.) Clevenger testified none of his supervisors ever told him to work overtime and not write it down. (Clevenger, 77:8-77:14.) Instead, despite the fact no one ever told him to do so, Clevenger claimed he worked off the clock because that was what he "surmised" he should do, because that was the "feeling," "mentality" or "unwritten law" of the group -- what he felt was "expected." (Clevenger, 62:12-64:13, 81:6-81:16.) Because of this, Clevenger explained, his "*time was off a little bit.*" (Clevenger 62:14-22 (emphasis added).) Additionally, Clevenger admits he never told his supervisors that he was not accurately recording his time. (Clevenger, 69:24-70:24.)

vii. Tracy Scott Wells

Plaintiffs assert that Tracy Scott Wells' affidavit supports the proposition that "people who worked off the clock were favored with call lists, contests, treatment and dividing up accounts" and that they "moved up more quickly." (Plaintiffs' Brief, at pp.15-16.) This is incorrect and disingenuous. Although Wells' affidavit appears to indicate that he has knowledge of multiple employees who benefited from off the clock work, when questioned under oath at his deposition, Wells recalled only one inside sales representative (whose name he "thinks" was "Jeff") who may have benefited from unspecified off the clock work. (Wells, 175:24-181:21.)

viii. Tawni Weaver

Plaintiffs also rely upon allegations of former MPC supervisor Tawni Weaver Plaintiffs' Brief at p.15, who was employed for about 7 months (from October 30, 2000 through May 31, 2001) as a consumer and small business supervisor. (Weaver, 58:13 to 58:24.) However, Weaver's affidavit must be viewed by the Court with much suspicion, if not disregarded altogether. Weaver is not a disinterested or impartial witness; she is currently pursuing her own separate lawsuit against Micron Electronics regarding allegations of retaliation under the FLSA and relating to much the same subject matter as this collective action suit.[39] (*See, Tawni Weaver*

---

[39] Additionally, plaintiffs fail to acknowledge the inherent conflict of interest, in that some of their claims are based on actions allegedly taken by Tawni Weaver in her capacity as a sales supervisor; for example, Tracy Scott Wells testified regarding a February 9, 2001 email he received from Weaver in which she states "If you're putting overtime on your timesheet, it will not be approved after that date, Tuesday of this week." (Wells, Tracy Scott, 222:2-224:9.) (Weaver's boss, Dominic Casey, subsequently overrode and corrected Weaver's errors, after Wells brought the email to Casey's attention. (*Id.*, 224:4-228:9.)

v. Interland, Inc., f/k/a Micron Electronics, CV-02-183-S-BLW, Complaint filed in United States Court for the District of Idaho on April 3, 2002.)[40]

(2) The numerous reasons stated for off-the-clock work demonstrate that there was no *de facto* policy.

Instead of supporting conditional certification, the depositions, affidavits and documents exchanged in discovery undermine any possibility of an overriding policy that motivates all of the claims; this evidence establishes that the named plaintiffs are not similarly situated to each other or to the class they wish to represent.

Plaintiffs (and claimants) attribute their failure to record all time worked to a myriad of individual reasons; some say on occasion their supervisor told them they could only work a certain number of overtime hours per week, and some say they didn't record all their time because they perceived or felt it was "expected" or an "unwritten law." Many also admit they never told their supervisors they were not accurately recording all the time they were working. There are widely-dissimilar and disparate justifications advanced by these individuals for the reasons they violated company policies and allegedly performed some off-the-clock work or failed to accurately record all of their work time. The disparity conclusively demonstrates the

---

[40] Moreover, Micron Electronics has been unable to take a complete deposition of Ms. Weaver to challenge the contentions in her affidavit. The first part of Weaver's deposition was taken on February 18, 2002, covering primarily general background information, until it had to be suspended. The deposition was greatly impeded, and then suspended, by the fact Ms. Weaver was then under the influence of no less than 8 prescription medications. (Weaver, 4:3-24.) Micron Electronics has been unable to continue with Weaver's deposition, because she continues to be heavily medicated and is not well-suited to have her deposition taken. Micron Electronics has requested that plaintiffs' counsel make Ms. Weaver available for her deposition on a date when she is not on her medications or that Micron be provided with a medical certification that Weaver must continue to take her medications (and therefore there will not be an opportunity for her deposition in the near future). (First Tollefson Aff., Ex. E.) Plaintiffs' counsel has not responded. Plaintiffs should not be allowed to rely upon the allegations of a supervisor whose reliability and credibility cannot be tested under deposition by Defendant.

complete lack of any common, company-wide single decision, policy or plan which resulted in off-the-clock work. Instead, what emerges are a few individuals working under different supervisors at different times and varying standards with regard to the use of overtime. There is no factual nexus with respect to a single decision, policy or plan implemented by Micron Electronics that would lend itself to a collective determination of each person's claims.

Some of the various "reasons" given by plaintiffs and claimants for alleged off-the-clock work or other claims are:

- Personally "believed" that he needed to do so to be successful and stay at the Company. (Ell, 116:18-117:3.)
- Claims one of his supervisors told him that his hourly wage would be insignificant to the amount of money he would make in commissions. (Ford, 62:18-24 (However, Mr. Ford admits that his supervisor didn't tell him not to accurately record his time. (Ford, 62:25-63:3; 96:6-18.).)
- Swore that he did accurately record all the time he worked but is not sure whether he got paid for all time recorded. (Garcia, 61:17-67:1 "There was no time that I worked that was not recorded.") (However, he also admits he never tried to reconcile the hours he submitted vs. hours he was paid. (Garcia, 67:12-25.).)
- Claims that supervisor, Jaime Nava, told his sales team in February, 2001 that "they weren't going to pay overtime more than about six or eight hours per pay period [every two weeks]." (Hinckley, 106:12-108:8.)
- Claims that supervisor, Jaime Nava told sales team in February, 2001 not to record more than 47 hours each week (but admits that Nava's statement had no effect on her time-keeping practices. (Smith, 247:25-248:8, 249:21-250:10; *see also*, Smith, 399:8-19.)
- Claims that supervisor, Jaime Nava told sales team in February, 2001 that [Nava's] budget had no more room for overtime" and "[t]hat there would be no more overtime." (Parrish, 82:18-85:24.)
- Did not request approval to work overtime because this would entail having to justify the reasons the overtime was needed (Craig 68:3-9; *see also*, 78:16-79:4.)
- In order to "build [his] business", he felt he "needed to work outside the parameters that were given to [him] in [his] eight-hour shift." (Parrish, 55:3-10.)

- Was what he "surmised" he should do, because that was the "feeling," "mentality" or "unwritten law" of the group -- what he felt was "expected." (Clevenger, 62:12-64:13, 81:6-81:16.)

- Inability to get work done during his regular shift and a purported conversation with Dominic Casey who allegedly said at one time that up to 45 hours per week would be allowed. (Kaufmann, 56:22-59:17.)[41]

- Liked coming in an hour before his shift began because he "liked getting in and getting organized before the day started." (Keen, 111:14-23.)

- Claims to have often come in early "to have a good day, get ahead or get caught up" and would not record the overtime because it needed prior approval. (Little Aff., ¶ 5.)

- Chose to work overtime and not record it, even though overtime was not authorized, because needed to make his sales goals and wanted to sell more computers to make a good commission check. (Moffett, 73:4-20.)

- Liked to submit timesheet early on Friday, (Monahan, 42:2-20), stay late to finish up on things for own benefit (44:18-45:13), and "[s]ometimes I just didn't, you know, think about it." (45:14-46:2.)

- In order to keep his job and get his work done. (Jim Wells, 67:17-69:16; 152:18-153:5) Admits supervisors never "condoned" working off the clock: "[i]n fact, they probably would have said the opposite if I would have eve[r] told them that I didn't mark time down." (Jim Wells, 154:1-24)

---

[41] Timothy Kaufmann was quite candid in admitting the likelihood of variations between each employee's timekeeping practices:

> Q. Would it surprise you that other sales employees accurately recorded their time that they worked?
> A. No.
> Q. Would it surprise you that other sales employees accurately recorded all of the time that they worked whenever they worked it?
> A. I don't think surprise is the right term. *I'm sure -- I mean, everyone had their own system, their own way of doing things.*
> Q. So nobody ever told you or any other employees, "Work five hours off the clock this week"?
> A. Not specifically.
> Q. "Punch in late, punch in, punch out early." Nobody ever told you to do that. Is that right?
> A. Other than Mr. Cox, no.

(Kaufmann, 90:25 to 91:13 (emphasis added).)

- "[T]he more hours you're there, the more money you make..." (Tracy Scott Wells, 110:2-10.) Most of his off the clock work was from home, working on an unauthorized database, but was not recorded because it was not "appropriate" and he didn't want to be considered "less productive." (Tracy Scott Wells, 112:1-9, 124:19-125:16)

These multiple reasons for alleged off-the-clock work, which seem to be unique to the individual, not only demonstrate the lack of a common policy or directive that unifies the claims, but would make collective treatment of their claims anything but efficient.

Finally, another significant factor to address are the sworn statements of the former supervisors and management, attesting to the fact that they never told any of the inside sales representatives to work off the clock.[42] Further, plaintiffs and claimants also testified that they were not told to work off the clock.[43]

c. The potential class is fraught with individualized determinations that dominate each claim.

The potential class had, among other issues, individualized motivations for working overtime and with vastly different damages claimed; therefore, the class is not manageable.

---

[42] Auchampach Aff., ¶¶ 7-8; Boschee Aff., ¶¶ 6, 8; Brakeman Decl., ¶ 7; Casey Aff. ¶¶ 4, 7, 8, 10; Chase Aff., ¶¶ 5-6; Church Aff., ¶¶ 4, 8, 9, 11; Cox Aff., ¶¶ 4, 7, 8, 9, 11; Ellis Decl., ¶¶ 4, 7, 9, 13, 14; Groeger Aff., ¶ 8; McCauley Aff., ¶¶ 8-9; Nava Aff., ¶¶ 4, 7, 9-11; Robinson Aff., ¶¶ 4, 6, 8, 9.)

[43] *See, e.g.*, Anderson, 40:24-41:1, 51:21-52:7 (admits that her supervisor did not tell her not to record all of the hours she was working); Clevenger, 81:2-16 (admitting he was not specifically told not to record time); Ell, 43:19-24; 135:8-10 (no one told him not to record his overtime or told him to work off the clock); Ford, 62:25-63:3; 96:6-18 (admits that his supervisor didn't tell him not to accurately record his time); McGeorge, 25:7-15 (was not told specifically to work more than 45 hours but not write it down, however she "inferred that" on her own); Moser, 117:24-118:15 (admits he was never told by any of his supervisors not to record his overtime); Parrish, 58:18-20; 62:3-17 (admits his supervisors never told him not to record his overtime); Jim Wells, 154:1-24 (admitting his supervisors never "condoned" or told him to work off the clock: "[i]n fact, they probably would have said the opposite if I would have eve[r] told them that I didn't mark time down").

Each employee would have his or her claims individually adjudicated; thus, defeating the purpose of a collective action (to efficiently adjudicate a group of persons' similar claims jointly).

For example, in *Ray* the court declined to grant facilitation of class notice for a proposed collective action. *Ray*, 1996 WL 938231, *4. There, the plaintiffs had alleged that the defendants had denied them payment of overtime in violation of the FLSA, specifically, that plaintiffs were told "that the job would require overtime but that they were not to record more than forty hours per week on their time cards," and that "[d]efendants' budget and staffing policies implicitly demonstrate the need and practice for [plaintiffs] to work overtime. *Id.* at *2.

The court took notice of the lenient standard which often applies but found that "in the present case, the facts before the Court are extensive, accordingly there is no need for discovery in order to reach a determination." *Id.*, at *4. In declining to grant notice, the court considered the different geographic locations, in addition to "the amount of overtime hours worked varies between plaintiffs, which demonstrates a lack of commonality for damages." *Id.* The court found that "it is not enough that all plaintiffs share the same employer and that they allege a common scheme. Rather, the court must also look to specific factual similarities or differences in the manageability concerns." *Id.* The lack of a specific common plan, policy or scheme was the demise of the plaintiffs' motion:

> Moreover, the illegal overtime plan alleged by Plaintiffs in the present action is not necessarily carried out through central management. *First, official written policy dictates that overtime will be paid in compliance with the FLSA. Second, if an illegal scheme exists at all, it is implemented on a decentralized level.* Specifically, the approval of overtime is controlled by area supervisors. Further, in that Plaintiffs also allege that budget plans demonstrate a need for improper overtime, it is notable that the budgetary plans differ according to region and property. *The*

evidence does not indicate that all the Plaintiffs sustained injury from one unlawful policy.

Id., at *4 (emphasis added). The plaintiffs here also have failed to allege a common unlawful policy that caused injury to the entire group of persons sought to be certified.

Mooney v. Aramco Services Co., No. H-87-498, 1993 WL 739661 (S.D.Tex. Aug. 25, 1993) addresses a collective action at the stage after the plaintiffs' request to send notice to a potential class had been granted. However, the analysis and reasoning of *Mooney* is directly applicable because it addresses how the discovery which has taken place revealed that the proposed class was not similarly-situated and could not be certified as a representative action.[44]

With regard to the six named plaintiffs and the forty-plus opt-in claimants here, the same analysis from *Aramco* can be applied because of the discovery that has already taken place. Of the 35 depositions that have taken place, along with the written discovery and thousands of documents produced by each side, it is clear that the plaintiffs are not even similarly situated to each other, let alone to the claimants. The combination of the disparate factual overtime claims, coupled with the need for Micron Electronics to assert defenses and individually address each person's claim, leads to the inevitable conclusion that this is not a case suited for collective

---

[44] After written and deposition discovery, the defendant filed a motion "That This Case Not Proceed as a Representative Action" because the opt-in plaintiffs were not similarly-situated with the named plaintiffs and with one another. *Id.* After an extensive review of cases on collective actions, the court noted that because facts had been developed through discovery, the court would analyze whether the case could proceed as a representative action. *Id.* at *9. The court then found that that plaintiffs' claims were of an individualized nature, with significant differences: "In view of this hodgepodge of claims and allegations, it is clear that the defenses available to [defendant] are just about as disparate as to the plaintiffs themselves." *Id.* at *10. Additionally, the evidence indicated that there was no single, company-wide reduction in force – rather, the downsizing of the work force "was implemented on a highly decentralized level by local management." *Id.* at *11. The facts developed indicated that "it would be difficult, if not impossible, to identify as many as two or three of the more than 130 potential plaintiffs who would be said to be 'similarly situated' within the meaning of the statute." *Id.* at *12.

action. Members of a proposed class are not similarly situated where the supposedly unlawful activities of the employer were not shown to be pursuant to a common scheme, plan, or policy. *See, e.g., Brooks*, 164 F.R.D. at 569 ("it is clear that any claims of the proposed opt-in plaintiffs would present disparate factual and employment settings"); *Tucker*, 872 F.Supp. at 947-49.

d. No manageable class exists because of the lack of commonality of damages and variation in defenses applicable to plaintiffs.

Plaintiffs' alleged off-the-clock claims are, by their personal and specialized nature, unsuitable and inappropriate for collective action treatment. For example, in order to meet their burden under the FLSA with regard to proving liability for off-the-clock work, a plaintiff must demonstrate that (1) he or she actually performed such work and (2) the employer had actual or constructive knowledge of the work. *Lyle v. Food Lion*, Inc. 954 F.2d 984, 987 (4th Cir. 1992). These are individualized inquiries that cannot be conducted on the basis of representative testimony, because the plaintiffs' and claimants' own testimony (examples are set forth previously) plainly demonstrates that each employee's claims are based on different circumstances and individual motivations. *Cf., McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (setting forth requirements for FLSA award to be based on representative testimony -- court may award backpay to nontestifying employees if the testimony of the other employees establishes a violation *and is fairly representative of the claims of other employees*).

The Court should also take into account defenses that Micron Electronics will be asserting, since fairness, logistical and procedural considerations are relevant in determining the potential manageability of the class. Because of the extensive discovery that has taken place, Micron Electronics has already identified several viable defenses which it will individually assert

with regard to certain of the plaintiffs and claimants.[45]

(1) Micron Electronics can raise a defense that sales representatives deceived them as to time worked.

One example of an individualized defense which makes the proposed class unmanageable is Micron Electronics' defense that many sales representatives deceived their supervisors and others as to the time they actually worked versus what was recorded. As set forth at the end of this section, many of the sales representatives admit that they were never told not to record all of their time and also that the sales representatives did not tell their supervisor or anyone in management that they were working off-the-clock or otherwise not reporting that they were not recording all time worked. Any alleged off-the-clock work was concealed, or occurred at home or during time periods when supervisors where not present and thus had no way of knowing whether the sales representatives on their teams were working off-the-clock. This will require an individual analysis of each situation and result in a completely unmanageable class.

An employer is not required to pay for time worked when the employer truly did not know, and had no reason to know, that the work was being performed. For example, employers are not required to compensate employees for time spent working when the employees

---

[45] As noted in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), such circumstances "set forth a mere prelude to what would prove to be [ ] individual jury trials to determine defendant's liability to each plaintiff." *Id.* The court noted that to proceed in a class action with the defenses for each member of the proposed class on *seriatim* basis, would be to defeat the purposes of a class action; essentially "[c]onsolidation of these claims into a representative class with the attendant defenses would not provide for an efficient proceeding for the resolution of what appears to be 1,325 distinct cases." Moreover, the court noted that "[t]o proceed without permitting [the employer defendant] to raise at the liability stage of trial each and every defense available to it where each potential class member is readily identifiable and must step forward in order to assert and prove an individual claim for liability or at least be the subject of a defense particular to each such plaintiff *would deprive defendant of the Fifth Amendment right to due process*." *Id.* (emphasis added).

purposefully withhold working-time information from the employer. *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414-15 (9th Cir. 1981) (denying overtime compensation when employee never mentioned working extra hours to his employer, employee reported no overtime on time sheets, and employer regularly paid overtime to those who reported it).[46]

(2) Broad variations in amount of overtime claimed by individuals and reasons for not accurately recording all time worked are individualized defenses Micron Electronics must litigate with respect to each Plaintiff and claimant.

Plaintiffs' own sworn testimony (affidavits and depositions) demonstrate that their decisions not to accurately record all time worked occurred on an individual basis, often for private reasons personal to themselves. Moreover, to the extent that plaintiffs and claimants allege involvement of their respective supervisors, such overtime decisions and actions were made, according to the allegations, on an isolated and individual basis. Therefore, individual inquiries into the circumstances of each plaintiff, claimant and supervisor are essential.[47]

---

[46] The following excerpts set forth examples of situations where Micron Electronics will have a defense that it has the right to individually explore about employees who deceived their employer as to actual time worked: Ell, 53:10-21; Ford, 83:4-88:8, Keen, 93:2-4, 114:9-25, 116:12-117:2; Anderson, 53:2-55:10; Larscheid Aff. ¶ 15 (claims supervisors "saw me at my desk" but there is no allegation that he ever told anyone he was working time off the clock); Mattson, 60:10-67:21; McGeorge, 84:12-25; Moser, 53:11-55:2; Parrish, 56:7-20; 59:5-12; 72:19-25; 74:8-75:14; 76:15-19; 77:11-17, Tracy Scott Wells, 111:11-25; 126:3-6; Jim Wells, 154:1-24 (admits supervisors never "condoned" working off the clock: "In fact, they probably would have said the opposite if I would have even told them that I didn't mark time down.").

[47] In *Walker v. Mountain States Tel. & Tel. Co.*, No. 87-M-790, 1988 WL 1000060 (D.Colo. Sept. 26, 1988), the court found: "The affidavits submitted by 34 of the 37 opt-in plaintiffs in response to the order to show cause do not support the collective claim of company wide age discrimination. They reflect management decisions made by local supervisors on an individual, decentralized basis. *The defendant has the right to defend against such individualized claims on an individualized basis.*" *Id.*, at *2; *see also*, *Ray*, 1996 WL 938231, at *4 (denying notice where "if an illegal scheme [mandating unpaid overtime] exists at all, it is implemented on a decentralized basis"); *Ulvin*, 141 F.R.D. at 131 (where the lay-off plan was implemented "on a decentralized level by local management" there was no company-wide plan);

In *Bayles v. American Med. Response of Colo., Inc.*, 950 F.Supp. 1053, 1062-63 (D.Colo. 1996), in finding that the plaintiffs were not similarly situated for the purposes of their FLSA claims, the court noted the importance of a lack of consistency with regard to the allegations of involvement and practices of managers:

> Plaintiffs vary dramatically in their accounts of whether defendant followed the stated policy, and the evidence appears to reflect that only certain management personnel of defendant may have strayed from that policy. *Accordingly, each plaintiff's proof of violation will be individualized because it depends upon how or whether defendant's policy was implemented by individual managers with regard to individual plaintiffs . . . .*"

Id. at 1061 (emphasis added).[48] Similarly, the individualized nature of the claims and defenses render this case unsuitable for collective action.

e. Other inside sales representatives specifically contradict the alleged experiences of plaintiffs and claimants.

To further demonstrate there is no "single decision or policy" that caused each alleged violation, Micron Electronics has provided affidavits of persons who were inside sales representatives during the relevant time, whose supervisor never told them to work off-the-clock, and who were never told not to record all time worked.[49] The affidavits demonstrate that plaintiffs and claimants are allegations specific and personal, and do not pervade throughout the group of persons who plaintiffs seek to conditionally certify and provide with notice.

Lusardi, 118 F.R.D. at 372 ("The ADEA permits class actions only where employees are similarly situated in order that a defendant be afforded an opportunity to effectively defend.").

[48] *See also, Adams v. United States*, 21 Ct. Cl. 795, 797 (Ct.Cl. 1990) (declining to grant plaintiffs' motion for court-ordered notice in FLSA overtime case because, *inter alia*, liability "may turn on circumstances unique to a given individual.")

[49] *See*, Dockstader Aff., Ex. A (¶ 5 of affidavits), Auchampach Aff., ¶¶ 9-10; Chase Aff., ¶¶ 9-11; Ellis Decl., ¶ 15; Groeger Aff., ¶¶ 10-11; Nava Aff. ¶¶ 12-13. Each person also adhered

3. The Court should disregard largely unsupported allegations regarding alteration of time cards.

There is a half-hearted allegation that supervisors reduced or altered the amount of overtime that had been submitted by plaintiffs or claimants. Plaintiffs' Brief at p.16. However, these general allegations are extremely isolated and do not pervade across class lines nor do they evince any single decision, policy or plan.[50]

a. Plaintiffs cannot find adequate support for their contention of tolerat[ing] the alteration of employee time."

Plaintiffs cite the testimony of only three people in support of their assertion that Micron Electronics "tolerated the alteration of employee time." Plaintiffs' Brief, p.16, citing Kimberly Smith, Michael Moser and Ryan Keen. An analysis of this testimony demonstrates the true lack of support for this claim.

According to plaintiffs, Ryan Keen "had overtime hours reduced." (*Id.*) However, when the cited portion of Keen's deposition is reviewed, it reveals that he also testified with regard to this issue: "I'm not sure" (Keen, 110:14-16, *see also*, 212:4-10 (noting that he was "suspicious" about whether his time was changed).) Keen testified that he had no knowledge of any practice or policy to alter time records to reduce wage and overtime claims. (Keen, 180:2-180:8.) Keen further admits (aside from what he believes are unknown problems with the calculation of his

---

to company policy with regard to overtime and timekeeping practices. (Auchampach Aff., ¶¶ 9-10; Brakeman Decl., ¶5; Chase Aff., ¶¶ 3, 9-11; Ellis Decl., ¶¶ 4-5 and Nava Aff. ¶ 4.)

[50] The following persons admit that they have no specific knowledge of alteration of timesheets or time they submitted: Ell, 105:2-16, 106:15-23; Ford, 95:1-7; Keen, 115:24-116:11, 180:2-13; Anderson 34:12-24; Mattson, 55:20-23, McGeorge, 33:6-15. Additionally, the affidavits of persons who were inside sales representatives during the relevant time attest to the fact that they knew Micron Electronics' policy prohibited alteration of timesheets and that they are not aware of any of their supervisors or anyone else in management improperly altering or changing the time they recorded and submitted. (Dockstader Aff., Ex. A (¶ 6 of affidavits), Auchampach Aff., ¶ 10; Chase Aff., ¶ 12; Ellis Decl., ¶ 15 and Nava Aff. ¶ 13.)

commissions) that Micron Electronics has paid him all wages due and owing and that Micron Electronics is not obligated to pay him any additional wages. (Keen, 190:9-25, 194:16-195:2.)

With regard to Kim Smith, she claimed to recall "two occasions" when she believes her overtime was reduced by her supervisor, Jaime Nava. However, Nava states that he properly altered Smith's timesheet to reflect work and leave time, for example, when she was unable to do so because she was out of town for a funeral. (Nava Aff., ¶ 11.)

Michael Moser could only specifically recall one occasion where he believed his overtime was reduced (by 2 to 3.5 hours) (Moser, 53:11-55:2; 118:7-22.) But, because he never talked to his supervisor about it (Moser, 53:14-55:11), it is unclear whether there was some other legitimate reasons for the alleged change or whether it was a simple accounting or clerical error that could have been immediately remedied. That is, supervisors did have the ability to alter, for proper reasons, the time that was submitted to them by their sales representatives.[51]

4. Plaintiffs have failed to establish a class of similarly situated plaintiffs regarding their claim for failure to pay overtime commissions.

In Section "C" of their brief, plaintiffs improperly try to shift their burden over to Micron Electronics. However, plaintiffs clearly bear the burden of demonstrating a factual nexus that binds the putative class together as victims of a policy of not paying commission overtime premiums. *See Harper v. Lovett's Buffet, Inc.*, 185 F.R.D. 358, 362 (M.D. Ala. 1999). Plaintiffs

[51] For example, Kim Boschee testified that the sort of circumstances that would lead her to change an employee's time sheet would be if the employee "was on vacation and they had vacation hours for that week but their time sheet was showing as they had worked and they were not there to actually submit their time sheet for themselves." (Boschee, 32:5-16; *see also*, Brakeman, 82:12-83:19 (sales representative ill or unavailable to put in the correct hourly information); Nava, 41:5-12 (explaining circumstance where he would change sales representatives' time sheets to increase the amount of time if the representatives forgot to make the adjustment to his or her time sheet); Auchampach Aff., ¶ 6; Chase Aff., ¶ 7; Church Aff., ¶ 10; Cox Aff., ¶ 10; Ellis Decl., ¶ 12; McCauley Aff., ¶ 7; Nava Aff., ¶ 8; Robinson Aff., ¶ 7.

generously argue that "according to *many* sales representatives who have filed consents in this action, MEI failed to include their sales commissions in the calculation of the overtime premium rate as required by 29 C.F.R. § 778.117." (Plaintiffs' Brief at pp. 17.)[52] There is no support for this allegation. In fact, plaintiffs' entire argument on this issue is that they are unsure whether the commissions were included and are looking to defendant to clarify the issue.

Defendants do not bear the burden, and do not assume the burden, on this issue. However, for purposes of explanation to the Court, the affidavits of Robert Griffard, Gabe Weske and Farrah Pippenger clearly demonstrate that during the time period relevant to this lawsuit, the inside sales representatives were appropriately paid overtime premiums based on their commissions. *See also*, Affidavit of Teresa A. Hill [filed under seal].[53]

Despite plaintiffs lack of evidence on this allegation, it is apparent from the depositions taken to date that other claimants have been motivated to join the lawsuit based on an unfounded

---

[52] However, plaintiffs provide only one deposition cite, which simply states that it was the deponent's "understanding" that although the commission overtime premiums had been paid in the past, it was going to change. Plaintiffs' Brief, p. 17, citing Deposition of Ryan Keen "page 76-77." Mr. Keen did not know what this "understanding" was based on and merely *thought* that he did not get paid his commission overtime premium. (Keen Depo. at 76:22-77:19.) Contrary to Mr. Keen's allegations, at least one deponent readily admitted that she understood she was paid additional overtime based on commissions. (McGeorge, 42:11-43:1, 51:6-52:15.)

[53] The FLSA requires that overtime compensation be paid at a rate of not less than one and one-half times the "regular rate" at which the employee is employed and requires that commissions be included in the employee's regular rate. 20 C.F.R. § 778.117. If it is not possible or practicable to calculate the commission weekly, "the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained." *Id.* at § 778.119. Once the commission can be determined, it must be apportioned back over the workweeks of the period during which it was earned; then, that amount must be divided by the total number of hours worked in that week to determine the increase in the hourly "regular rate." *See id.* at § 778.120. Additional overtime due as a result of the commission is then computed by multiplying one-half of the increase in the "regular rate" by the number of overtime hours worked in the week. *Id.* at §778.120(a)(ii). Micron Electronics followed precisely this calculation method in determining and paying overtime premiums based on commissions. (*See,* Griffard Aff.; Weske Aff.; Pippenger Aff.)

belief or supposition that commissions were not included in overtime calculations. These claimants, like Mr. Keen, provide no factual support for this claim. For example, Michael Hinckley, a named Plaintiff in the case, specifically states that he became upset and joined the suit in part because he *believed* his commissions were not included in his overtime premiums and he *believed* this added up to a "substantial amount of money." (Hinckley, 214:24-217:18.) Similarly, as other claimants apparently believe an unspecified or alleged miscalculation of the overtime based on commission involves a substantial amount of money, therefore, they have decided to join the lawsuit.[54]

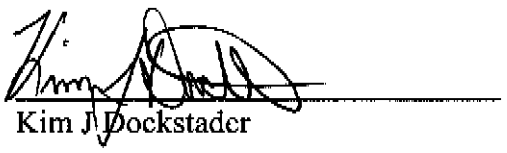
Plaintiffs have failed to provide any factual support that inside sales representatives were not paid overtime premiums based on commissions. Therefore, plaintiffs fail to demonstrate a class of similarly situated putative plaintiffs that were victims of this unfounded allegation.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' Motion for conditional certification and request for notice should be denied in its entirety and the claims of plaintiffs as a class should be dismissed.

Dated this 23rd day of August, 2002.

STOEL RIVES LLP



Kim J. Dockstader

[54] Tracy Scott Wells admits he eventually signed a consent to join the lawsuit based on a belief the overtime calculation was incorrect. (Wells, 280:16-19.) However, Mr. Wells also indicated in an email addressed to a former co-worker, Travis Turner, the method he used to calculate the commission overtime that "resulted in very close numbers to what I was paid. (*See*, Hill Aff., Ex. A (Wells' email), Ex. B (Supplemental Argument) (filed under seal).)

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2002, a true and correct copy of the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION, FILED ON FEBRUARY 13, 2002** was served on the following individuals by the manner indicated:

William H. Thomas Daniel E. Williams Christopher F. Huntley HUNTLEY, PARK, THOMAS, BURKETT, OLSEN & WILLIAMS 250 S. Fifth Street, Suite 660 Boise, Idaho 83701-2188	[ ] [X] [X] [ ]	By Hand Delivery By Facsimile By U.S. Mail By Overnight Delivery

Kim J Dockstader